Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM 2005

BOBBY RAY SMART,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Petitioner was denied due process and equal protection of the law due to there being a split among the circuits as to whether the payment of money by a drug dealer to a drug supplier constitutes money laundering under U.S.C. 1956(a)(1)(A)(i)?

2. Did the Eleventh Circuit effectively decide this issue in Smart's case without issuing an opinion?

3. Is the Eleventh Circuit's opinion in conflict with their previous decisions related to this issue?

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OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit was released on June 16, 2005 and is unpublished. A Petition for Rehearing was denied on August 25, 2005. *See* Appendices A-1 and A-2.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

The Eleventh Circuit's opinion was rendered on June 15, 2005. Smart's Petition for Rehearing *En Banc* was denied on August 25, 2005 and his Motion to Recall Mandate and Stay Execution was denied on October 11, 2005. *See* Appendices A-1 through A-3.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 18 U.S.C. §1956(a)(1)

Laundering of Monetary Instruments

(a)(1)Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity -

(A)(i) with the intent to promote the carrying on of specified unlawful activity....

STATEMENT OF THE CASE

The Petitioner, Bobby Ray Smart, asserts in this case that there is a conflict among the Circuits as to whether the payment of drug proceeds by a drug dealer to a drug supplier constitutes money laundering under 18 U.S.C. 1956(a)(1)(A)(i). Smart argues that the Circuits which have found that money paid to a drug supplier for drugs cannot be the basis for a conviction under §1956(a)(1)(A)(i), are correct because proof of money laundering must be separate from the proof required for conviction of the underlying offense of drug trafficking. In formulating their opinions, these Circuits are in alignment with the legislative intent of Congress by holding that "promotion" money laundering offenses could not be established by a single buyer's repeated payments to a drug distributor and the concept of "fronting" drugs to a dealer by a distributor does not reach the intent of Congress when they passed this provision.

Smart was indicted on two counts of a four-count second Superseding Indictment on May 1, 2003. He was charged in Count One with violating 21 *USC* 846 and 841(b)(a)(A), conspiracy to possess with the intent to distribute more than 500 grams of methamphetamine, and in Count Four with violating 18 *USC* 1956(h), conspiracy to launder proceeds of an unlawful activity under 1956(a)(1)(A)(i) *and* (a)(1)(B)(i), the "promotion" and "concealment" provisions, respectively. Smart entered a plea of Not Guilty on May 7, 2003 and the case proceeded to trial before the Honorable L. Scott Coogler, on September 8, 2003. Smart was acquitted of Count One, wherein it was alleged that between October of 1999 August of 2002, he, along with 15 other co-defendants, conspired with each other to possess with the intent to distribute more than 500 grams of methamphetamine. Smart was found *not guilty* of this offense by a jury on September 12, 2003. He was found guilty on that same date of conspiring to launder money

from the proceeds of the activity charged in Count One. During the trial, the prosecution effectively abandoned the "concealment" provision of the charge. On September 22, 2003, Smart filed a Motion for Judgment of Acquittal which was denied on September 25, 2003. Sentencing was re-scheduled on several occasions. On February 17, 2004, Smart filed an Addendum to the PSI and Renewed Motion for Judgment of Acquittal. Sentencing was held on April 20, 2004 and Smart received a term of imprisonment of 151 months on Count Four. Smart gave Notice of Appeal and the trial court set Smart's Motions for Acquittal and for appeal bond for a hearing. On July 22, 2004, the trial court denied the Motion for Judgment of Acquittal on jurisdictional grounds but did not address the merits.

On June 16, 2005, and Eleventh Circuit panel opinion was released affirming Smart's conviction. He filed a Petition for Rehearing *En Banc* which was denied on August 25, 2005. His Motion to Recali Mandate and Stay Execution was denied on October 11, 2005.

REASONS FOR ALLOWANCE OF THE WRIT

The Eleventh Circuit has not decided whether the payment of money by a drug dealer to a drug supplier for drugs that were previously "fronted" to the dealer on consignment, as alleged in this case, constitutes money laundering under §1956(a)(1)(A)(i). In construing §1956, however, the Eleventh Circuit has determined that money laundering must be punished separately from an underlying criminal offense, and therefore the underlying offense must have been completed before any act of laundering can occur. United States v. Christo, 129 F.3d 578, 579-80 (11th Cir. 1997) (per curiam). The Eleventh Circuit has also decided that financial transactions involving illegally obtained funds which advance ongoing criminal conspiracies constitutes money laundering under §1956,

See, e.g., United States v. Carcione, 272 F.3d 1297, 1303 (11th Cir. 2001), they have not decided in the context of "fronting" drugs when the underlying offense has been completed and the subsequent payment of proceeds to the supplier constitutes laundering. Keeping in mind that Smart was found not guilty of the underlying criminal offense, this is a very important questions to resolve among the circuits and even among the Eleventh Circuit itself, in its seemingly conflicting positions of affirming Smart's conviction, while failing to reach the ultimate issue. They have effectively given an opinion without issuing a holding on this issue.

The Tenth Circuit, in United States v. Dimeck, 24 F.3d 1239, 1246 (10th Cir. 1994), held that a money laundering conviction cannot be supported solely on the basis of a courier's activity because the delivery of money did not result in the kind of transaction prohibited by §1956(a)(1)(B)(i). Dimeck's conviction was based on the delivery of alleged drug money to another person who was to deliver it to the seller of the drugs. In reaching its conclusion, the Dimeck court analyzed the congressional intent of §1956(a)(1) as a whole and concluded that this type of conduct was not what the legislature was prohibiting under this statute.

The Seventh Circuit has also reached the same conclusion. In United States v. Mankarious, 151 F.3d 694, 705 (7th Cir. 1998), the court held that the transaction or transactions that created the criminally-derived proceeds must be distinct from the money-laundering transactions, because the money-laundering statutes criminalize "transaction[s] in proceeds, not the transaction[s] that create[] the proceeds."

The Fourth Circuit, in United States v. Heaps, 39 F.3d 479 (4th Cir. 1994), spoke to the argument in Smart's case, that the Government weakly addressed through the